Image #5 AF 1761

Attorney's Docket No.: 00414-046001

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant	: Martin F. Berry et al.	Art Unit	: 1761
Serial No.	: 09/447,023	Examiner	: Helen Pratt
Filed	: November 22, 1999		
Title	: CRANBERRY PROCESSES AND PRODUCTS		

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Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

REPLY BRIEF PURSUANT TO 37 C.F.R. 1.193(b)(1)

Responsive to the Examiner's Answer mailed December 9, 2003, Appellants reaffirm the arguments previously submitted in the Brief In Appeal filed September 5, 2003, and respond to the new points raised in the Examiner's Answer as follows.

Rejection Under 35 U.S.C. § 103(a)

In the Answer, the rejection is maintained in view of Chiriboga, in particular, Table 1. The rejection also refers to the desirability of drinks such as ginger ale, Seven Up, Sprite, apple juice, and white wine.

As for Chiriboga, the rejection compares anthocyanin values in Table 1 with values recited in Appellants' claims. This comparison is simply not probative. The data in Table 1 refer to the anthocyanin content of an intermediate blend or an experimental cranberry juice cocktail - a finished product suitable for retail sale (CJC) (second and fourth columns, respectively). Appellants' claims, on the other hand, refer to the anthocyanin content of a cranberry juice component, which alone, would not be suitable as a finished product for retail sale, i.e., a juice derived from cranberries, used to make a food product that is a blend.

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As explained in the Mantius Declaration, the anthocyanin content of a blend is not directly comparable to the anthocyanin content of a juice component used to make a blend. Appellants attempted to determine the anthocyanin content of Chiriboga's "pale" juice component. But, as also explained in the Mantius Declaration, the anthocyanin content, nor the actual color, of the "pale" juice component in Chiriboga can not be reliably determined. In any case, Chriboga does not suggest a food product having as the sole component from cranberries a juice component with an anthocyanin content of about 10 mg/ml or less. Rather, even in the intermediate blend (Table 1, second column), Chiriboga utilizes "dark" juices. In the experimental CJC's (Table 1, fourth column) Chiriboga incorporates both "dark" juice and cranberry-derived anthocyanin pigment.

Perhaps recognizing that the anthocyanin data in Chiriboga is not comparable to the claimed anthocyanin content, the rejection does not argue that Chiriboga anticipates the claims. Rather, the rejection appears to argue that because Chiriboga utilizes juice from "pale" cranberries and because other drinks of low color, such as ginger ale, Seven Up, Sprite, apple juice, and white wine, were known to be desirable, it would have been obvious to make a low color cranberry food product. The rejection notes that Chiriboga was published "before the public acceptance of clear beverages" (Examiner's Answer, page 9). Clearly, this latter statement is incorrect, at least in the instance of apple juice and white wine. In any case, the rejection in essence reasons that, because other low color drinks were desirable, any low color drink would have been obvious. Such a conclusory analysis is clearly inadequate to support an obviousness rejection of Appellants' claims, which relate to a specific food product, a blended juice, that includes a juice component from a specific fruit, the cranberry, that is in a specific state, i.e. an anthocyanin content of 10 mg/100 ml or less, and in specific formulations.

Appellants submit that the Examiner has still not met her burden of establish a prima facie case of obviousness. Accordingly, the rejection should be reversed.

Rejection Under 35 U.S.C. § 112, first paragraph

The rejection objects to the language in Applicants' claims that "the juice component derived from cranberries having said anthocyanin content is the sole component from cranberries in the blend." The rationale for the rejection is as follows:

> Appellants argue as to the rejection under 112 first paragraph in [sic, is] that the specification should literally state each limitation. However, the Examiner did not exactly make this statement.
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> Appellants argue that the use of a low anthocyanin cranberry juice as the sole cranberry component (or in the absence of other cranberry components) is conveyed throughout appellants' specification and one way of finding basis is through advances with regard to utilizing low anthocyanin cranberries instead of conventional red berries. However, one wonders if the idea is conveyed throughout the specification why it is not explicitly stated. Even though Appellants' examples do show no other added ingredients, however, the claims are not closed to added ingredients. Phrases such as "and with less need to add citric acid or citric acid containing juices such as lemon juice to modify flavor only requires less need not a "sole component from cranberry juice that has an anthocyanin content of a certain amount.
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> * * *
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> Appellants argue as to Table 3 that it shows a specific example of a blended juice beverage in which the low anthocyanin cranberry juice is the sole component from cranberries in the blend. However, this table was used to show a 16% light color cranberry juice as the sole source of acid to achieve a titratable acidity content of about 0.49% (underlining added). (Examiner's Answer, pages 9-11).

This reasoning is self-contradictory. While arguing on the one hand that the rejection does not require literal support in the specification for each claim limitation, it nevertheless looks for "explicit" support. Applying this improper standard, the rejection then parses the specification, straining to point out that certain advantages of Appellants' blended juices discussed in the specification, such as the need to add less acid, could be enjoyed without the low anthocyanin juice as the sole component in the blend.

But the specification explicitly indicates that the low color cranberry juice component is the "sole source of acid" in the blend. (See, e.g., specification, page 11, line 6; and page 3, line 21.)

The written description rejection is untenable. The specification as a whole expressly describes the benefits of the low color cranberry juice component, including the "light color...of...the extracted juice ...[which] facilitates the formulation of cranberry products with mild flavors and colors other than red. (See, e.g., specification, page 7, lines 33-35.) In particular, the food product is "a blended juice product...[formulated by] dilution with water, addition of acid, or addition of other juices". (Id., lines 24-27.) In Table 3, the specification expressly illustrates a blended beverage that includes water, sweetener and the low color cranberry component as the sole component from cranberry. The independent claims are fully supported by, and indeed track, this disclosure. Claim 70 is directed to a blended juice food product that includes a component selected from another juice, water, sweetener or acid, and the low color cranberry component as the sole component from cranberries in the blend. Claim 97 is directed to a blended juice food product that includes another juice component, sweetener and the low color cranberry component as the sole component form cranberries in the blend.

For these reasons, and the reasons stated in the Brief In Appeal, Appellants submit that the final rejection should be reversed.

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Respectfully submitted,

Date: FEBRUARY 9, 2004

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